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No. 01-1500

IN THE

Supreme Court of the United States

ERICK CORNELL CLAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW[1]

STATEMENT OF THE CASE

In 1997, a jury in the United States District Court for the Northern District of Indiana convicted petitioner of arson and distribution of cocaine. *See* Pet. App. 2a. The district court sentenced petitioner to 137 months in prison and three years of supervised release. *See id.* The Seventh Circuit affirmed the conviction and sentence on November 23, 1998, and, in the

[1] *Amicus curiae* was appointed by the Court on July 29, 2002, to brief and argue this case in support of the judgment below. *See* 71 U.S.L.W. 3115 (2002). This brief was wholly authored by *amicus curiae*, and no person or entity other than JENNER & BLOCK, LLC made a monetary contribution to the preparation or submission of the brief.

absence of any petition for rehearing, issued its mandate on December 15, 1998. *See id.*

Petitioner did not file a petition for a writ of certiorari. Accordingly, under the Seventh Circuit's decision in *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), the issuance of the mandate triggered the start of the one-year period in which petitioner could permissibly file a motion pursuant to 28 U.S.C. § 2255, which begins running on "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255 para. 6(1); *see Gendron*, 154 F.3d at 674 (stating that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal").

Contrary to the Seventh Circuit's clearly established rule, petitioner filed a § 2255 motion on February 22, 2000, one year and sixty-nine days after the mandate issued. The government opposed the motion solely on the ground that it was "completely meritless," *see* Gov't Resp. to 2255 Motion to Vacate, Set Aside, or Correct Sentence, at 1 (N.D. Ind. filed Apr. 24, 2000), but the district court directed the parties to "show cause why [petitioner's § 2255] petition should not be dismissed as untimely," and ultimately dismissed the motion on that ground. Pet. App. 5a, 7a-9a. The court also refused to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised). *See id.*

The Court of Appeals affirmed. The court pointed out that it had previously instructed petitioner to address the merits of certain claims in his brief, and that he had failed to follow this instruction, addressing only the issue of the timeliness of his motion. Pet. App. 1a-6a. Nevertheless, the court determined that the timeliness issue was "dispositive of the case." *Id.* The court acknowledged that the Circuits had split on the issue, but

declined to revisit its holding in *Gendron*. Therefore, because petitioner had filed his § 2255 motion "sixty-nine days too late," the court found that "the district court was correct when it denied the motion." *Id.* at 6a.

SUMMARY OF ARGUMENT

Congress established that, except in circumstances not applicable here, a motion under 28 U.S.C. § 2255 must be brought within one year of "the date on which the judgment of conviction *becomes final*." 28 U.S.C. § 2255 para. 6(1) (emphasis added). Congress did *not* include in § 2255 a clause it included in an analogous statute of limitations enacted at the same time, governing petitions for habeas corpus relief under 28 U.S.C. § 2254. Congress required that petitions under § 2254 generally must be brought within one year from "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review*." 28 U.S.C. § 2244(d)(1)(A) (emphasis added).

A. Basic principles of statutory interpretation dictate that, when Congress simultaneously enacts two markedly similar provisions, but then chooses significantly *different* language to govern one aspect of those provisions, Congress intended that difference for a reason. The natural interpretation of the language of the statute is that, whereas the limitation period in § 2244 begins to run only after "the conclusion of direct review or the expiration of the time for seeking such review," the limitation period in § 2255 is *not* dependent upon the expiration of the time for review – which, indeed, is the *ordinary* rule; in most contexts and for most purposes, the finality of a judgment is *not* dependent on the expiration of the time for review. This is the conclusion reached by the Courts of Appeals for the Seventh and Fourth Circuits and by several district courts – and, indeed, this is the position previously advocated on appeal by the United States, *see Kapral v. United States*, 166 F.3d 565,

569 (3d Cir. 1999). Thus, petitioner's judgment of conviction in this case became final when the Court of Appeals issued its mandate, the last judicial act in connection with petitioner's direct appeal.

Because Congress used very different language to define two otherwise analogous (and virtually identical) limitation provisions in § 2244 and § 2255, the proper canon of construction that must be applied in this case is set forth in *Russello v. United States*, 464 U.S. 16 (1983): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (citation and internal quotation marks omitted). This canon is deeply entrenched in this Court's precedents, and has been applied in a wide variety of statutory contexts – including, on two previous occasions, the very statute at issue in this case. *See Duncan v. Walker*, 533 U.S. 167 (2001); *Hohn v. United States*, 524 U.S. 236 (1998). Any other reading of § 2255 and § 2244 is impossible, because it would render superfluous much of the language in § 2244.

The parties struggle to identify a different (and more favorable) canon of construction, and to distinguish *Russello*, but without success. The parties inexplicably invoke the principle that *identical words* used in different parts of the same statute are intended to have the same meaning, but the simple answer is that Congress quite clearly did *not* use "identical words" in § 2244 and § 2255. The government also directs its fire at the *expressio unius est exclusio alterius* principle, but that is not the canon at issue here.

Principally, the parties place great reliance on a claim that application of the *Russello* principle here proves too much, because the words "the conclusion of direct review" also appear

in § 2244 but not in § 2255. But it would have made no sense for Congress to have written the statute to say that the limitation period in § 2244 runs from "the date on which the judgment became final or the expiration of the time for seeking direct review." Instead, § 2244 sets up a comparison of finality triggers, and this requires the two alternate triggers ("the conclusion of direct review" and "the expiration of the time for seeking such review") to be placed side by side and held up for examination.

B. The application of the *Russello* principle in this case is strongly enforced by the fact that the ordinary and established meaning of when a judgment "becomes final" does *not* include the expiration of time for review. Rather, and particularly with regard to the commencement of statutes of limitation and other time bars, it is broadly established that a judgment "becomes final" when the Court of Appeals issues its mandate in connection with the direct appeal as of right, without regard to the possibility of further discretionary proceedings, unless a stay of the mandate is obtained. This is the established rule under the former version of Federal Rule of Criminal Procedure 33 (which, significantly, Congress considered as a model with respect to an early formulation of the § 2255 time limitation), the Speedy Trial Act (which uses the identical "becomes final" language), and other limitation statutes. This Court may presume that Congress was familiar with this settled law. *See Holloway v. United States*, 526 U.S. 1, 9 (1999); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979); *United States v. Merriam*, 263 U.S. 179, 186 (1923).

Indeed, the rule that a judgment becomes final upon the issuance of the mandate of the Court of Appeals, without regard to the expiration of the time to file a petition for certiorari, is also consistent with the ordinary operation of judgments. Judgments of all kinds of all courts, trial and appellate, become "final" without regard to the expiration of

the time for review. The determination of the Court of Appeals in this case is unremarkable: the court simply concluded that petitioner's conviction became "final" when the Court of Appeals issued its mandate, the last act on petitioner's direct appeal. Although it is established that the finality of an "otherwise final" judgment may be suspended by certain post-judgment filings, and that a statute of limitations often is arrested or tolled upon such a post-judgment filing or appeal, in this case the petitioner did *nothing* to arrest the finality of the judgment of the Court of Appeals. Ultimately, the view that, without any further definition in the statute, the judgment of a court does not "become final" until the time expires for *review* of that judgment undermines the integrity of a judgment of a court of law.

C. The parties place great reliance on the definition of "final" this Court has used "for purposes of retroactivity analysis" in cases such as *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989); *see Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). But this Court has made clear that the non-statutory definition of "finality" used in these cases derives from "basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. The Court determined that it was precluded from "fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Id.* at 323 (internal quotation marks omitted). These considerations have no applicability here. Moreover, whereas Congress's formulation in § 2244 is analogous to that in the *Griffith/Teague* cases, the formulation in § 2255 markedly is *not*.

Finally, the remaining arguments of incongruity and impracticality asserted by the parties with respect to the statutory interpretation of the Court of Appeals simply are

inapposite. Because the difference in the language of the statutory text is material and plain, it is not necessary for this Court to divine and find sufficient a reason for what Congress has done. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 717 (2002); *Mansell v. Mansell*, 490 U.S. 581, 594 (1989). But there nevertheless *are* reasons why Congress would treat claims under § 2254 (to which § 2244 relates) and § 2255 differently, given fundamental differences in the nature of the proceedings under § 2254 and § 2255. Moreover, under the court's interpretation of § 2255 here, defendants still have adequate time to prepare claims under § 2255 (and far more than the six months permitted for claims under § 2254 in certain *capital* cases under 28 U.S.C. § 2263); the issue in this case is whether a defendant who does not petition for certiorari will have one year after the Court of Appeals issues its mandate (and almost 10 months after the time to file a petition for certiorari expires), or *one year and sixty-nine days* after the Court of Appeals issues its mandate. And it is simply false that the interpretation of the court below will encourage the filing of additional and unnecessary petitions for certiorari. The risk of frivolous filings comes from the practice – not at issue here, and contrary to the established interpretation of analogous provisions of Rule 33 and the Speedy Trial Act – that the time bar in § 2255 is automatically extended if a defendant files a petition for certiorari.

In sum, the *Russello* principle clearly and appropriately governs this case. The decision of the Court of Appeals is consistent with the normal operation of judgments and should be affirmed.

ARGUMENT

I. A COMPARISON OF THE LANGUAGE OF 28 U.S.C. § 2255 AND 28 U.S.C. § 2244 ESTABLISHES THAT CONGRESS DID NOT INTEND THE WORDS "BECOMES FINAL" IN § 2255 TO BE DEPENDENT ON THE EXPIRATION OF THE TIME FOR REVIEW.

As this Court repeatedly has declared, "[l]ogic and precedent dictate that [the] starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citations and internal quotation marks omitted); *accord Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This Court's obligation is to construe § 2255 as it is written, not as the parties would have the Court amend it. Here, in order to determine the meaning of the term "final" in the § 2255 limitation period, the language of § 2255 must be compared to other provisions in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Duncan v. Walker*, 533 U.S. 167, 172-73 (2001); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (making clear the importance of considering a statute in the context of the whole "statutory scheme"). In particular, it is important to consider the differences between § 2255, which sets forth a limitation period for collateral review motions of federal prisoners, and § 2244, which sets forth a limitation period for analogous habeas corpus petitions of state prisoners pursuant to § 2254.

Section 2244 contains language that, if transplanted into § 2255, would clearly give federal prisoners who fail to file petitions for certiorari the extra sixty-nine days on which the

parties here insist.[2] However, § 2255 pointedly does not contain that language, and Congress's choice to include it in one provision and exclude it in the other must be presumed to be purposeful and significant. As the Courts of Appeals for the Seventh and Fourth Circuits and several district courts have held, *see Gendron*, 154 F.3d at 674; *United States v. Torres*, 211 F.3d 836, 838-41 (4th Cir. 2000); *see also, e.g.*, *United States v. Burch*, 37 F. Supp. 2d 1249, 1253 (D. Kan. 1998) (collecting cases), *rev'd*, 202 F.3d 1274 (10th Cir. 2000) – and, indeed, as the United States previously argued, *see Kapral v. United States*, 166 F.3d 565, 569 (3d Cir. 1999) – the necessary inference is that Congress did *not* intend that § 2255 have the same meaning as § 2244. Comparison of § 2255 and § 2263, which governs the habeas petitions of prisoners serving capital sentences in certain states and which contains language similar to § 2244, is similarly instructive.

1. For the most part, § 2244's one-year limitation period closely parallels the period set forth in § 2255. Each provision describes four possible dates and provides that the limitation period shall run from the latest of those dates. The provisions' descriptions of three of those four dates – relating to governmental impediments to filing, newly recognized constitutional rights, and newly discovered facts – are virtually identical, although there are a few appropriate differences in wording to reflect the fact that § 2244 relates only to state prisoners. *Compare* 28 U.S.C. § 2255 para. 6(2)-(4) *with id.*

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[2] Under § 2255, a defendant who does not file a petition for certiorari either will have one year from the date the Court of Appeals issues its mandate to bring a § 2255 motion (under the construction of the Fourth and Seventh Circuits), or one year and sixty-nine days from the date the court issues its mandate (under the construction of the other Circuits). *See* Gov't Br. at 25 (recognizing that "the difference is slight," normally involving only sixty-nine days).

§ 2244(d)(1)(B)-(D). But, although both sections refer to finality of judgment as the marker for the fourth date, they do so in strikingly different ways. Section 2255 states that "[t]he limitation period shall run from . . . the date on which the judgment of conviction becomes final," *id.* § 2255 para. 6(1), whereas § 2244 states that "[t]he limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," *id.* § 2244(d)(1)(A).

Because Congress did not otherwise define "final" and because it used different "final"-related language in § 2244 and § 2255, the proper canon of construction in this case is plainly not one that tries to harmonize the use of a single statutory term or phrase in a number of different contexts. Rather, the canon that must be applied is set forth in *Russello v. United States*, 464 U.S. 16 (1983): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (internal quotation marks and citation omitted). This canon is deeply entrenched in this Court's precedents, and has been applied in a wide variety of statutory contexts, including AEDPA. *See, e.g.*, *Barnhart*, 534 U.S. at 452-53; *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); *Bates v. United States*, 522 U.S. 23, 29 (1997); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 432 (1987).

In this case, Congress chose to include the phrase "the expiration of the time for seeking [direct] review" in § 2244, and thus to lengthen the limitation period for state prisoners who did not seek such review, but chose not to include similar language in § 2255. Under *Russello*, "[t]he absence of [the

§ 2244] language in § 2255 provides a powerful negative inference that the start of its one-year period of limitation is not delayed until the expiration of the period in which a federal defendant could have petitioned for certiorari, but did not." *Torres*, 211 F.3d at 839-40; *see also Gendron*, 154 F.3d at 674 ("In § 2244, Congress expressly included the period for seeking review whether or not a petitioner elected to avail himself of the opportunity. Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections."). *See generally, e.g.*, *General Motors Corp.*, 496 U.S. at 538 ("Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in § 110(a)(3)(A) [of the Clean Air Act].").

Any other reading of the two provisions is impossible, because it renders superfluous much of the language describing the § 2244 limitation. If "final" as used in AEDPA necessarily included the expiration of time for seeking further review, then there would have been no need for Congress to include the extra language that appears in § 2244(d)(1)(A). *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous."); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Petitioner's contention that this language is included because different states themselves have different definitions of finality, *see* Pet. Br. at 22, cannot be accurate: only federal courts entertain § 2254 petitions, and the question that must be answered by both § 2244 and § 2255 is what "final" means as a matter of federal law. *See, e.g.*, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) (explaining that "[w]hether one has been 'convicted' within the language of the

gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); *United States v. Turley*, 352 U.S. 407, 411 (1957). Federal courts are just as able to divine a uniform federal meaning of "final" for application to state prisoners (and then to apply it to the different kinds of proceedings that result from the varying laws of different states) as they are able to divine the meaning of "final" in § 2255.

In short, because of the difference in wording between § 2255 and the otherwise almost identical § 2244, the two statutory sections must mean different things. While that conclusion does not yet determine affirmatively what "final" means in § 2255, it does definitively rule out the specific meaning advocated by the parties. But unless the parties are correct, petitioner's motion, filed on the last possible day under the most generous possible interpretation of the statute, was plainly untimely. Moreover, as shown below in Part II, the most natural reading of "final" in § 2255 is that it does *not* refer to the time for seeking further review when that review is not actually sought.

2. Faced with these powerful textual arguments, the parties struggle to identify a different (and more favorable) canon of construction, and to distinguish *Russello* away. First, the parties claim that § 2244 essentially defines the term "final" as used in § 2255. Second, the parties assert that *Russello* does not apply to AEDPA provisions, and more specifically that it cannot be used in comparing § 2244 and § 2255 because at least part of § 2244 must necessarily be read into § 2255's limitation period. Third, the parties argue that the language of § 2263 undermines the comparison between § 2244 and § 2255. These arguments must be rejected.

a. *Section 2244 does not provide the meaning of "final" in § 2255.* In reading the "final[ity]" provisions of § 2255 and § 2244 side by side, the parties inexplicably invoke the principle that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (discussing two uses of word "overpayment" in one statutory provision); *see* Pet. Br. at 20; Gov't Br. at 19. But this principle of statutory interpretation simply has no relevance here. As the Fourth and Seventh Circuits correctly recognized, Congress quite clearly did not use "identical words" in § 2244 and § 2255, even though both sections have the same purpose of imposing a limitation period on a formerly limit-less collateral review process. Section 2255 refers to the moment when a federal prisoner's conviction "becomes final," and elaborates no further; § 2244, in contrast, sets forth two specific circumstances in which a state prisoner's conviction will be considered to have become final for habeas purposes.

Nor does § 2244, as the parties intimate, provide a complete definition of "final" for use in all of the AEDPA provisions that follow it. Section 2244 could have easily been written in a definitional manner – it could have said, for instance, that the one-year limitation period runs from the date when "the judgment became final, which is defined in this chapter as the date at the conclusion of direct review or the expiration of the time for seeking such review." But "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Rather, Congress wrote § 2244 to suggest nothing more than that two particular events are relevant for the specific purpose of fixing the limitation period for the federal habeas applications of state prisoners. *See* 28 U.S.C. § 2244(d)(1)(A) (stating that the triggering date is the latest of the date "on which the judgment became final *by* the conclusion of direct

review or the expiration of the time for seeking such review" (emphasis added)); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

b. *Russello is fully applicable here.* Both petitioner and the United States attempt to distinguish away or otherwise attack the *Russello* principle, but none of their various efforts in this regard is successful. As an initial matter, it must be noted that the *Russello* canon is distinct from the related principle of *expressio unius est exclusio alterius*, at which the government directs its fire. *See* Gov't Br. at 26, 28-29. The *expressio unius* principle is that "expressing one item of [an] associated group or series excludes another left unmentioned," *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002), and "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 122 S. Ct. 2045, 2050 (2002); *see, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Ford v. United States*, 273 U.S. 593, 611 (1927). But *expressio unius* applies where it is unclear whether the drafter even considered the existence or the relevance of the excluded term, which the drafter by definition did not use; the *Russello* principle applies where the drafter *did* choose to use in one place, and therefore necessarily must have known about and thought about, the word or item excluded in another place. The *Russello* principle therefore obviously creates a stronger presumption, and thus a stronger canon of interpretation, than *expressio unius*.

In this case, there is no reason to believe that the *Russello* principle is inapposite based on the so-called "hypothesis of careful draftsmanship." Pet. Br. at 22-23 (quoting *United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000) (citing

Kapral v. United States, 166 F.3d 565, 579 (3d Cir. 1999) (Alito, J., concurring)). The *Russello* decision itself and the many other decisions of this Court that have relied on the same basic canon of statutory construction do not depend on the existence of some proof that Congress labored particularly carefully over the statutory provisions at issue; rather, they embody a basic and generally applicable presumption that Congress does act carefully and thoughtfully when it drafts statutes. The *Russello* Court compared a section of RICO that spoke broadly of "any interest . . . acquired" with the immediately following section, which more narrowly covered "any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of." *Russello*, 464 U.S. at 23 (internal quotation marks and citation omitted). The Court "refrain[ed] from concluding . . . that the differing language in the two subsections has the same meaning in each," stating that it "would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.*; *see also, e.g., Barnhart*, 534 U.S. at 454.

Similarly, the difference between § 2255 and § 2244, which are closely related provisions, is far too striking to ascribe to a mere drafting mistake. Indeed, the *Russello* principle applies with particular force where, as here, the two provisions to be compared were enacted at the same time as part of the same statute, and where the relevant language in the provision from which the negative implication is drawn was added after the provision being interpreted had already come into existence.[3] As this Court has explained, "negative

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[3] As petitioner explains, when the first proposed trigger for the § 2244 statute of limitations was changed in S. 623 from "the date on which State remedies are exhausted" to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking

implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *see also Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . . ."); *United States v. Granderson*, 511 U.S. 39, 63 (1994) (Kennedy, J., concurring) ("The

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such review," the proposed language in § 2255 was not similarly altered. Pet. Br. at 24-26 (citing S. 623, 104th Cong. § 2 (1995)) (internal quotation marks omitted).

Otherwise, as the government expressly suggests, the legislative history of AEDPA is not especially helpful in interpreting § 2255's limitations period, *see* Gov't Br. at 22 n.6; this is no doubt why the parties place very little emphasis on it. The government has identified two House Reports, separated by more than a decade, that were part of the very long legislative process leading up the enactment of AEDPA and that used the § 2244 language to describe the § 2255 time bar, *see id.*, but these Reports are not dispositive of Congress's intent. Neither one, of course, is the report for S. 735, the bill that was actually enacted as AEDPA in 1996 following the Oklahoma City bombing. *See* H.R. Rep. No. 104-23, at 16 (1995) (discussing H.R. 729); S. Rep. No. 98-226, at 30 (1983) (discussing S. 1763); *see also* H.R. Conf. Rep. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (report to accompany S. 735). Further, Congress's passing use in a Committee Report of a phrase that was eventually included in the statute in a provision *other* than § 2255 cannot trump § 2255's actual language. Congress obviously thought that the phrase in question was important enough to form part of the text of the law where it was relevant and applicable, and presumably made a conscious choice not to use the phrase – which is nowhere mentioned in the conference report discussing the enacted bill – in § 2255 itself. *See generally, e.g., Bailey v. United States*, 516 U.S. 137, 150 (1995) (explaining that "Congress knew how to draft a statute to reach a firearm that was 'intended to be used,'" but did not draft the provision at issue that way).

presumption loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment. But in this case, given the parallel structure of [the provisions] and the fact that Congress enacted both provisions in the same section of the same Act, the presumption is strong."); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); Pet. Br. at 20 (explaining that § 2244 and § 2255 should be read together because they deal with the same issue and were enacted contemporaneously); Gov't Br. at 19-20.

It is true that in *Lindh* this Court identified one specific portion of AEDPA as inartfully drafted. *See Lindh*, 521 U.S. at 336. But *Lindh* itself, while acknowledging this statutory "loose end," was nevertheless decided on the basis of a detailed textual examination of AEDPA's provisions and on a negative implication drawn by comparing one chapter of AEDPA to another: "We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* at 327.

In addition, this Court has *expressly* applied the *Russello* canon of interpretation to AEDPA provisions on two separate occasions. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court found that "[t]he clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability," and relied on this comparison in concluding that it had jurisdiction to consider denials of certificate applications. *Id.* at 250-51 (quoting *Bates* and *Russello*). More recently, in *Duncan v. Walker*, 533 U.S. 167 (2001), this Court interpreted the words "State post-

conviction or other collateral review" in § 2244(d)(2) to exclude a federal habeas motion, and in doing so compared the provision to other sections of AEDPA in which "Congress specifically used both the words 'State' and 'Federal' to denote state and federal proceedings." *Id.* at 172-73 (quoting *Bates* and *Russello*); *see also, e.g.*, *Smaldone v. Senkowski*, 273 F.3d 133, 137 (2d Cir. 2001) (interpreting § 2244(d)(2) by comparing it to § 2244(d)(1)(A), and noting that at least seven other Courts of Appeals have done the same), *cert. denied*, 122 S. Ct. 1606 (2002). Accordingly, the mere status of provisions as part of the AEDPA enactment does not exclude them from the operation of the *Russello* principle.

Nor, as petitioner and the government claim, does application of the *Russello* principle preclude reading "final" in § 2255 to refer to "the conclusion of direct review" merely because this phrase appears in § 2244 along with the phrase "the expiration of the time for seeking such review." *See* Pet. Br. at 26-27; Gov't Br. at 28; *see also United States v. Garcia*, 210 F.3d 1058, 1060 (9th Cir. 2000); *Burch*, 202 F.3d at 1278. Under the *Russello* canon, Congress's use of different language in the two sections strongly implies that the sections mean different things – not that they cannot overlap in any way.

The parties' argument simply disregards the linguistic realities of § 2244. That provision is plainly written to specify two particular circumstances in which the judgment should be deemed to have become final for purposes of state habeas petitions, and to ask which one is the "latest." It would have made no sense for Congress to have written the statute to say – as the parties would seemingly require as a prerequisite for the application of *Russello* – that the limitation period runs from "the date on which the judgment became final or the expiration of time for seeking direct review." Instead, § 2244 sets up a comparison of finality triggers, and this requires the two alternative triggers to be placed side by side and held up for

examination. *See Webster's Third New Int'l Dictionary* 1585 (1993) (stating that "or" is used as a "function word to indicate . . . an alternative between different or unlike things, statuses, or actions").

Thus, § 2244 is most sensibly read to contrast the more specific phrase "the expiration of the time for seeking [direct] review" with the more general phrase "the conclusion of direct review." The general is listed first, and the more specific is then contrasted with it. Thus, even if the first-listed general phrase is identical to what was intended in § 2255, there was simply no reason in that provision, which contains no such contrast, for Congress to spell out the meaning that is more commonly understood by the bare term "final."[4] Accordingly, the *Gendron* and *Torres* courts appropriately understood "the expiration of the time for seeking [direct] review" in § 2244 as an *additional* element, one that was significantly absent from the comparable limitation provision for federal prisoners. The application of *Russello* by the Fourth and Seventh Circuits was not selective – rather, it was sensitive to Congress's diction and sentence construction in the particular provisions at issue. *See Gendron*, 154 F.3d at 674; *Torres*, 211 F.3d at 839-40. *See generally Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (refusing to read "jurisdiction" in 28 U.S.C. § 1500 as meaning "jurisdiction to render judgment" when the latter, more elaborated phrase appeared in several "nearby sections of title 28").

The parties attempt to create the illusion that, under the logic of *Russello*, anything listed in § 2244 and not listed in

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[4] Of course, if "final" in § 2255 means something even narrower than the "conclusion of direct review," the *Russello* problem that the parties conjure disappears altogether. *See* pp. 22-27, *infra*. This discussion assumes, without conceding the point, that the premise of the parties' argument is correct.

§ 2255 must necessarily be excluded from § 2255, an argument that depends on conflating *Russello* with the distinct (though related) *expressio unius* canon. But mutual exclusivity is not in any way a precondition of *Russello*; rather, the difference between the language of the provisions reflects a *difference* in scope – the two provisions cannot have exactly the same meaning. For this reason, *Russello* can readily be applied even where, for instance, one of the two statutory provisions being compared defines a category that is a subset of the category defined in the other provision – indeed, as described above, that was the case with *Russello* itself. Accordingly, reading "final" in § 2255 to refer to the conclusion of direct review fully adheres to *Russello*, because it gives content to Congress's use of language in that section that differs from the language used in § 2244. In contrast, the parties' position would give the two statutes *identical* meanings despite their different language.

c. *Section 2263 reinforces this analysis*. Finally, contrary to the parties' contentions, an examination of § 2263, a more specialized provision that applies to state prisoners serving capital sentences in certain qualifying states, only tends to reinforce what the comparison of § 2244 and § 2255 demonstrates. Section 2263, echoing § 2244, provides that its 180-day limitation period begins running "after final State court affirmance of the conviction and sentence on direct review or the expiration of time for seeking such review." 28 U.S.C. § 2263(a). Although § 2263 is less similar in general wording and structure to § 2255 than is § 2244, it is nonetheless "significant that Congress did not choose, as it did in § 2263, to use language in § 2255 that affirmatively expands the period of time before the start of the limitation period" for prisoners who choose not to seek further available review. *Torres*, 211 F.3d at 840.

It is true, as petitioner points out, that § 2263 also includes a tolling provision, stating that "[t]he time requirements . . .

shall be tolled . . . from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition." 28 U.S.C. § 2263(b)(1). That tolling provision is obviously included because the § 2263 limitation period is triggered by the date of affirmance, rather than the date the judgment becomes final. Although there is a well-developed body of law suspending "finality" when additional review is sought, of which Congress is presumed to be aware, *see infra* Part II, Congress can obviously avoid the application of that law by selecting a specific date on which a judgment is deemed to become final, and Congress's express selection of the date of affirmance in § 2263 has that effect. But the absence of such a tolling provision from § 2255 is devoid of significance in this case. It does not tell this Court anything about how Congress wished § 2255 movants who did *not* file a petition for certiorari to be treated. *See Torres*, 211 F.3d at 840. Indeed, if anything, the absence of any tolling provision in § 2255 can be read to indicate that Congress did not wish for equitable tolling to be applied in that context, and thus intended for federal prisoners – who, after all, have already received some federal court review of their cases – to file any § 2255 motion promptly regardless of whether a petition for certiorari actually was pending. That construction certainly does not help petitioner.

Accordingly, reading § 2255 together with § 2244 and § 2263 precludes the parties' arguments that a federal prisoner who fails to file a petition for certiorari is nevertheless entitled to an extra sixty-nine days – above and beyond the one year from final judgment provided by Congress – in which to prepare and file a § 2255 motion.

II. IN MOST CONTEXTS AND FOR MOST PURPOSES, A JUDGMENT OF A COURT "BECOMES FINAL" WITHOUT REGARD TO THE EXPIRATION OF THE TIME FOR FURTHER REVIEW.

1. It is not the case that a judgment of conviction ordinarily "becomes final" only when the time expires to petition this Court for a writ of certiorari (or this Court resolves a petition that has been filed), as the parties essentially urge here. Rather – and particularly with regard to the commencement of statutes of limitation and other time bars – it has been broadly established that a judgment "becomes final" when the Court of Appeals issues its mandate in connection with the direct appeal as of right, *without* regard to the possibility of further discretionary proceedings, *unless* a stay of the mandate is obtained.[5]

a. *Rule 33.* Until it was recently amended, Rule 33 of the Federal Rules of Criminal Procedure provided that a motion for a new trial based on newly discovered evidence must be filed "before or within *two years after final judgment*." Fed. R. Crim. P. 33 (version in existence prior to Dec. 1, 1998) (emphasis added), *quoted in United States v. Lussier*, 219 F.3d 217, 218 (2d Cir. 2000).[6] Courts uniformly held that this time

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[5] This Court frequently has noted the difference between appeals as of right and discretionary review proceedings. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 612, 616-18 (1974).

[6] This Rule is particularly noteworthy because, in the legislative history of an early formulation of the § 2255 time bar noted by the government, *see* Gov't Br. at 22 n.6, Congress indicated that it sought to enact a statute of limitations under § 2255 that would be comparable to the time bar that existed under this version of Rule 33. *See* S. Rep. No. 98-226, at 9-10 (1983). The Report noted the absence of a time limitation under § 2255 and explained:

bar was triggered when the Court of Appeals issued its mandate of affirmance, regardless of the possibility of further review.

Thus, in *United States v. Cook*, 705 F.2d 350 (9th Cir. 1983), the court explained that courts had construed "final judgment" under Rule 33 as "the date on which the appellate process 'is terminated.'" *Id.* at 351 (citations omitted). The court continued: "The appellate process is terminated – and thus the two-year period begins to run – when an appellate court issues its mandate of affirmance." *Id.* The court in *Cook* specifically rejected an argument that the two-year period did not begin to run until the Supreme Court had denied a petition

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> [T]he absence of a time limit is at odds with the approach taken in other contexts by Federal law to the review or re-opening of judgments. For example, a Federal defendant must normally decide whether to appeal within 10 days, . . . and a Federal defendant seeking re-trial on grounds of newly discovered evidence [under Rule 33] must do so within 2 years of final judgment. The last-mentioned limitation has the particularly curious effect that a Federal prisoner who discovers proof of his innocence more than two years after final judgment has no judicial remedy, but must seek executive clemency, while a State or Federal prisoner who asserts violations of Constitutional rights . . . is afforded a federal judicial remedy without limitation of time. The time limitation rule of [the bill at hand] would reduce this discrepancy, bringing the availability of collateral relief *into closer conformity with the approach taken by federal law in other contexts to maintenance of orderly procedures and assurance of finality* in criminal adjudication.

Id. (emphasis added) (footnote omitted). The parallel between Rule 33 and § 2255 also is apt because a motion under § 2255, like a motion under Rule 33, was viewed by Congress as a further step in the defendant's *criminal* case. *See, e.g., United States v. Frady*, 456 U.S. 152, 182 (1982) (Brennan, J., dissenting) (quoting S. Rep. No. 80-1526, at 2 (1948)). In 1998, Rule 33 was revised to provide that a motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty.

for certiorari that the defendant had filed. *Id.* The court explained: "Cook's argument would have merit if he had obtained a stay of our mandate pending his application to the Supreme Court for a writ of certiorari. Cook, however, did not obtain (or even seek to obtain) a stay of our mandate before he sought review in the Supreme Court. The mandate having been issued and neither stayed nor recalled, the Supreme Court's action on his certiorari petition is thus irrelevant to the issue of the timeliness of his Rule 33 motion." *Id.* (citation omitted).

Other courts similarly held that "the appellate process terminate[d]" and the judgment became "final" for purposes of the two-year limitation period of Rule 33 when the Court of Appeals issued its mandate of affirmance – and that the filing of a petition for certiorari was irrelevant unless the defendant first obtained a stay of the mandate. *See, e.g., United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *Lussier*, 219 F.3d at 218-19. In *Lussier*, the Second Circuit explicitly held that a motion filed more than two years after the Court of Appeals had issued its mandate of affirmance, but *within* two years of this Court's denial of a petition for certiorari, "was filed more than two years after the judgment *became final*." 219 F.3d at 218 (emphasis added). Because the defendant had not obtained a stay of the mandate, the court rejected the defendant's argument that "the original judgment did not become 'final' until the Supreme Court denied certiorari." *Id.* The court reasoned that "appellate courts remain in control of the date for issuing mandates and generally delay issuance [pursuant to Fed. R. App. P. 41(d)] only when the merits of a criminal appeal are of sufficient substance to make Supreme Court review at least a reasonable possibility." *Id.* at 218-19 (quoting *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995)) (internal quotation marks omitted); *see also United States v. Biaggi*, 823 F. Supp. 1151, 1160 (S.D.N.Y. 1993) (stating that "movants provide no case law to support their contention[] that . . . the denial of

certiorari amounts to a final judgment"), *aff'd*, 48 F.3d 1213 (2d Cir. 1994) (unpub. table decision).[7] Thus, the established practice under Rule 33 was that a judgment became "final" upon the issuance of the mandate of the Court of Appeals and the two-year limitation period began to run on that date – *not* the date that time expired to file a petition for certiorari.[8]

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[7] In numerous other cases in which a petition for certiorari was *not* filed, courts similarly held that the judgment became "final" and the two-year limitation period in Rule 33 began to run when the Court of Appeals issued its mandate of affirmance, and not when the time expired to file a petition for certiorari. *See, e.g., Romero v. United States*, 28 F.3d 267, 268 (2d Cir. 1994) (judgment final upon "the date of the issuance of the mandate of affirmance"); *United States v. Dayton*, 981 F.2d 1200, 1203 (11th Cir. 1993) ("the return of the mandate"); *United States v. Gross*, 614 F.2d 365, 366 n.2 (3d Cir. 1980) ("the date when the appellate court issues its mandate"); *United States v. Granza*, 427 F.2d 184, 185 n.3 (5th Cir. 1970) ("issuance of the mandate of affirmance"); *Casias v. United States*, 337 F.2d 354, 356 (10th Cir. 1964) ("mandate of affirmance"); *Harrison v. United States*, 191 F.2d 874, 876 (5th Cir. 1951) ("mandate of affirmance").

[8] Significantly, the same reasoning employed under Rule 33 has been used by the Courts of Appeals to hold that the possibility of further discretionary review in this Court on a petition for *rehearing* does *not* warrant the conclusion that the judgment of conviction is not "final" within the meaning of § 2255. The Rules of this Court specifically allow a petition for rehearing to be filed within twenty-five days after the date of an order denying a petition for certiorari, so long as the petition is "limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." S. Ct. R. 44(2). However, unless the decision denying a petition for certiorari is *suspended* by a Justice or the Court, the order denying the petition is effective regardless of the right to seek rehearing. *See* S. Ct. R. 16(3) ("The order of denial [of a petition for certiorari] will not be suspended pending disposition of a petition for rehearing except by order of the Court of a Justice"). On the basis of this Rule, the Courts of Appeals have held unanimously that – even though Rule 44.2 defines circumstances in which rehearing (and therefore further proceedings on "direct" review) could be appropriate – a judgment of conviction "becomes final" within the meaning of § 2255 when this Court denies a petition for certiorari. *See, e.g., United States v. Segers*, 271 F.3d

b. *Speedy Trial Act*. A similar rule has been applied under the Speedy Trial Act. Using the same words as in § 2255, Congress provided that the time for trying or retrying a criminal defendant following an appeal, a mistrial, an order for a new trial, or a collateral attack "shall commence within seventy days from the date the action occasioning the trial [or retrial] *becomes final*." 18 U.S.C. § 3161(d)(2) (emphasis added) (trial); *id.* § 3161(e) (retrial). In cases involving trials or retrials following an appeal, it is broadly established that the date the action occasioning the trial or retrial "becomes final" is the date the Court of Appeals issues its mandate. *See, e.g.*, *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) ("an appellate disposition occasioning a retrial *becomes final* on the date when the appellate court issues its mandate" (emphasis added)); *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) ("an appeal *becomes final* on the date the mandate is issued" (emphasis added)); *United States v. Felton*, 811 F.2d 190, 198 (3d Cir. 1987) (en banc) ("The action of a court of appeals does not become final until its mandate is issued. . . . [W]e agree with the district court that the language of the statute ('the date the action . . . becomes final') requires that the date of issuance [of the mandate] be the point of departure."); *United States v. Robertson*, 810 F.2d 254, 259 & n.6 (D.C. Cir. 1987); *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981); *see also United States v. Cheek*, 3 F.3d 1057, 1065 (7th Cir. 1993).[9]

181, 186 (4th Cir. 2001) (judgment becomes final "absent the issuance of a suspension order by the Court or a Justice thereof"), *cert. denied*, 122 S. Ct. 1331 (2002); *United States v. Willis*, 202 F.3d 1279, 1280 (10th Cir. 2000) (denial of certiorari is final "absent an actual suspension of an order denying certiorari by the Court"); *Giesberg v. Cockrell*, 288 F.3d 268, 271 (5th Cir.), *petition for cert. filed*, 71 U.S.L.W. 3283 (U.S. Sept. 27, 2002) (No. 02-522); *Horton v. United States*, 244 F.3d 546, 551 (7th Cir. 2001); *Washington v. United States*, 243 F.3d 1299, 1300 (11th Cir. 2001); *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000).

In *Scalf*, the court specifically held that, in order for a judgment to "become final" within the meaning of 18 U.S.C. § 3161, it is *not* necessary for the government's time to petition for certiorari to expire. The court rejected the government's argument that "the time period does not begin to run or is tolled while [the Solicitor General's] office makes a decision on whether or not to seek certiorari on the previous appeal," explaining that "[w]e have already held that the period begins to run when the mandate of the appellate court is issued. An application to seek certiorari or a decision to make such application *has no effect on the finality of an appellate decision* unless the mandate of the court is stayed or withdrawn in connection with such event." *Scalf*, 760 F.2d at 1059 (emphasis added).

c. *Other*. The same rule has been applied in other contexts involving statutes of limitations. *See, e.g.*, *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 593 (8th Cir. 1968) (holding that limitation period provided by Missouri "savings" statute began to run when dismissal of earlier action was affirmed on appeal and Court of Appeals issued its mandate, because "[w]e find no support for the contention that the filing of a petition for a writ of certiorari prevents the judgment of this court from becoming final until the Supreme Court acts upon the petition, where no stay of mandate has been filed").

Thus, it is commonly understood, particularly with regard to the commencement of limitation periods, that a judgment

[9] A few courts modified this rule slightly, holding that the speedy trial clock resumed when the district court *received* the mandate. *See, e.g.*, *United States v. Long*, 900 F.2d 1270, 1276-77 (8th Cir. 1990); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987).

"becomes final" when it is affirmed on the direct appeal as of right, *regardless* of the possibility of further discretionary proceedings, *unless* a stay of the mandate of affirmance is obtained. This Court may presume that Congress was familiar with this settled law, particularly given Congress's reference to Rule 33 in the early legislative history discussed above. *See supra* note 6; *Holloway v. United States*, 526 U.S. 1, 9 (1999) ("it is reasonable to presume that Congress was familiar with the cases and the scholarly writing" interpreting particular terms); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) (presuming congressional knowledge of interpretation of similarly worded earlier statute); *United States v. Merriam*, 263 U.S. 179, 187 (1923) (Congress presumed to intend judicially settled meaning of terms). Certainly, within the contexts presented by these decisions, the finality of a judgment is *not* dependent upon the expiration of the time to file a petition for certiorari in this Court.

2. The rule that a judgment becomes final upon the issuance of the mandate of the Court of Appeals, *without* regard to the expiration of the time to file a petition for certiorari, also is consistent with the ordinary operation of judgments. Judgments of all kinds of all courts, trial and appellate, become "final" *without regard to the expiration of the time for review*.[10]

Thus, with respect to the judgment of a trial court, "[t]raditionally, a 'final judgment' is one that is final and

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[10] At bottom, the meaning of the words "becomes final" cannot be separated from the meaning of "final." The word "become" or "becomes" generally means simply "to come to exist" or "to come to be" something – in this case, *final*. *See Webster's Third New Int'l Dictionary* 195 (1993). *Cf. Mitchell v. United States*, 526 U.S. 314, 326 (1999) (holding that the defendant's privilege against self-incrimination following the entry of a guilty plea expires when "the sentence has been fixed and the judgment of conviction has *become final*" (emphasis added)).

appealable." *Melkonyan v. Sullivan*, 501 U.S. 89, 95 (1991). In *Melkonyan*, the Court noted that Congress had added an "unusual" definition of final judgment in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G), as one that is "final and not appealable." *See Melkonyan*, 501 U.S. at 95. Significantly, it is that same "unusual" definition – that a "final" judgment is one that is not appealable (and for which a petition for certiorari may no longer be filed) – that the parties seek to adopt as the ordinary meaning of the words "becomes final" in § 2255.

The same rule applies with respect to the "finality" of the judgment of an appellate court. A judgment of the Court of Appeals is final when it fully resolves the appeal and leaves nothing left to be decided. *See, e.g., Scofield v. NLRB*, 394 U.S. 423, 427 (1969) (explaining that a judgment of a Court of Appeals "'for our purposes is final when the issues are adjudged' and settled with finality" (quoting *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945))); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212-13 (1952) (stating that, despite the fact that only a second judgment of the Court of Appeals was marked "final," an earlier judgment "was for all purposes final," because "[i]t put to rest the questions which the parties had litigated in the Court of Appeals" and "was neither 'tentative, informal nor incomplete'" (citation omitted)).[11]

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[11] In the *Market Street Railway* case, the Court explained, with regard to a state rule that provided that a judgment of the California Supreme Court generally became final 30 days after filing: "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, *it is not awaiting lapse of time to become a judgment*, it merely is subject to modification." *Market St. Ry.*

Absent a stay, judgments of both trial and appellate courts generally are "final" and enforceable without regard to the expiration of the time for review. Thus, in a criminal case, the defendant may be incarcerated in accordance with the sentence despite the opportunity for appeal, unless a stay is granted in accordance with Federal Rule of Criminal Procedure 38(b) and Federal Rule of Appellate Procedure 9(b). In a civil case, the brief "automatic stay" of execution of judgment does not extend to the time for appeal, *see* Fed. R. Civ. P. 62(a), and the judgment may be executed unless a supersedeas bond is obtained and approved by the Court, *see* Fed. R. Civ. P. 62(d).

Similarly, upon entry of the judgment of a Court of Appeals (which generally occurs upon issuance of the court's opinion, *see* Fed. R. App. P. 36), the ninety-day period in which to petition for certiorari begins to run. *See* S. Ct. R. 13(3). However, before that time expires, the "mandate" of the Court of Appeals generally will issue. *See* Fed. R. App. P. 41(b).[12] And "the mandate is effective when issued," Fed. R. App. P. 41(c) – regardless of the fact that a petition for certiorari still may be filed. In order to avoid the dictates of the mandate pending the resolution of a petition for certiorari, a party must affirmatively seek a stay of the mandate, as is expressly authorized by Federal Rule of Appellate Procedure 41(d)(2).

Co., 324 U.S. at 551 (emphasis added).

[12] Rule 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time." Fed. R. App. P. 41(b). A petition for panel rehearing or rehearing en banc generally must be filed within fourteen days after entry of judgment. Fed. R. App. P. 35(c), 40(a)(1). Thus, in the absence of a petition for rehearing, the mandate typically issues twenty-one days after judgment, well within the time that a petition for certiorari may be filed.

Thus, both at trial and on appeal, a judgment of a court generally becomes "final" and operative "when the issues are adjudged." *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Such a pronouncement of a court, though subject to the possibility of further review and modification, "is not awaiting lapse of time to become a judgment" or to become final. *Id.* Thus, under the most common understanding of the words, the judgment of the Court of Appeals affirming petitioner's conviction was *not* dependent upon the expiration of the time to file a petition for certiorari in order to "become final."

3. It also is firmly established that the finality of a judgment that has otherwise "become final" may be suspended by certain post-judgment filings. Significantly, however, it is only the *actual filing* of such an application that suspends the finality of the judgment and arrests the application of time bars that are triggered by the entry of that judgment. These rules therefore again illustrate the general rule that a judgment "becomes final" upon the date of entry by the court, *not* the date when time expires for further review.

For example, it long has been established in both civil and criminal cases that a timely motion for a new trial or for reconsideration acts to suspend the finality of a judgment, and the time to appeal does not begin to run until the motion for a new trial or for reconsideration is decided. *See, e.g., Brockett v. Brockett*, 43 U.S. (2 How.) 238, 241 (1844) (Story, C.J.); *United States v. Ellicott*, 223 U.S. 524, 539 (1912); *Morse v. United States*, 270 U.S. 151, 153-54 (1926) ("There is no doubt under the decisions and practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the

motion or petition."); *United States v. Healy*, 376 U.S. 75, 78 (1964); *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (a motion for rehearing in a criminal case, like a motion for rehearing in a civil case, "renders an otherwise final decision of a district court not final until it decides the petition for rehearing").[13]

The rule has been applied broadly to judgments of appellate courts as well as trial courts. Thus, the filing of a timely petition for rehearing in the Court of Appeals "operates to suspend the finality of the . . . court's judgment," *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 266 (1942), and has the effect of "tolling the start of the period in which a petition for certiorari must be sought," *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Similarly, a timely petition to reopen or reconsider an order of an agency "stay[s] the running of the . . . limitation period" for judicial review. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987).

Several features of the rules established in these cases are significant. First, the Court often has determined that a post-judgment filing operates to arrest the running of a time bar for further review despite the lack of any statutory authority for such a rule, and despite the fact that the time bar at issue is otherwise jurisdictional and cannot be extended. Thus, in *Healy*, this Court noted that "[a]ppellees place great reliance on the absence of any statute or rule governing the effect of rehearing petitions of the Government," but the Court accepted and applied the rules previously established in other civil and criminal cases, which it noted also "lack such a foundation."

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[13] These rules do not involve "tolling" in the classic sense, in that the time bars at issue have been held to run again, in full, once the petition for reconsideration is resolved. *See Ibarra*, 502 U.S. at 4 (explaining that issue is better described in terms of when time bar begins to run, rather than in terms of tolling, because, where doctrine applies, time bar runs in full from date of subsequent decision).

Healy, 376 U.S. at 79. Indeed, in *Locomotive Engineers*, the Court ruled that a petition to reopen or reconsider an agency decision stayed the running of the limitation period for judicial review despite the existence of statutory language that, "notwithstanding" the authority of the agency to reopen and reconsider its orders, "an action of the Commission . . . is final on the date on which it is served." *Locomotive Eng'rs*, 482 U.S. at 284; *see also Jenkins*, 495 U.S. at 45 n.13 (noting that practice of "tolling" time to petition for certiorari upon application for rehearing "is *now* reflected in this Court's Rule 13.4" (emphasis added)); *compare Department of Banking*, 317 U.S. at 266.[14]

Second, it is only the actual and timely filing of an appropriate motion for reconsideration or other review that suspends the finality of the judgment and the application of the time bar at issue. If no such petition is timely filed, the time limitation begins to run when the judgment originally was entered – *not* when the time to file the petition expires. *See, e.g., Morse*, 270 U.S. at 154 ("The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, *depends upon the due and seasonal filing* of the motion for a new trial or the petition for rehearing." (emphasis added)); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264-65 (1978).

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[14] It also is noteworthy that, in several instances, the filing that operated to arrest the running of a jurisdictional time bar occurred a considerable time after the judgment was entered. *See, e.g., Ellicott*, 223 U.S. at 538-39 (government motion for a new trial filed 84 days after judgment operated to suspend finality of judgment); *Healy*, 376 U.S. at 78 (in the absence of a rule specifying a different time limit, government petition for rehearing would be considered timely "when filed within the original period for review" on appeal).

Although it is widely established that a timely petition for reconsideration or rehearing filed in the court that rendered the judgment operates to suspend the finality of the judgment and to arrest the application of time bars that are triggered by the entry of that judgment, the effect of a filing for further review in *another* court is less uniform. With regard to statutes of limitations, however, it often has been held that the actual filing of an appeal as of right suspends the running of a statute of limitations triggered by the entry of the judgment from which the appeal is taken. *See, e.g., Morales v. City of Los Angeles*, 214 F.3d 1151, 1155 (9th Cir. 2000) (holding, under California law, that statutes of limitation are tolled during an appeal, but begin to run again when the appellate court issues a final judgment, and concluding that this result is "not inconsistent with federal law"). In these cases, however, the finality of the judgment – and the running of the statute – is not dependent on the expiration of the time for further review; rather, the statute is tolled only if an appeal actually is filed.

As described above, however, a judgment generally *is* deemed to "become final" for purposes of the commencement of a statute of limitations despite the filing of a petition for certiorari or other discretionary review, unless a stay is obtained. *See* pp. 22-27, *supra*. Authority is slight in which a judgment is not deemed to "become final" for purposes of the commencement of a statute of limitations until a filed petition for certiorari is resolved.[15] But, in any event, the general rule

[15] The Judicial Conference of the United States, construing the provisions of the Speedy Trial Act discussed above, *see* pp. 26-27, *supra*, confirmed that the statute is not "reasonably interpreted as justifying delay for the entire period within which an appeal from a district court order could be taken or a petition for Supreme Court review filed." Committee on the Administration of the Criminal Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974*, as amended 17-20 (rev. Dec. 1979). The Conference continued, however, that

is this: while certain filings may suspend the finality of a judgment, the judgment otherwise is final – and applicable time bars begin to run – unless the filing actually is made. The finality of the judgment is not dependent on the expiration of the time to make such a filing.

4. Thus, the Court of Appeals properly applied the "ordinary" meaning of the words used by Congress in § 2255. The language of § 2255 simply declares that the one-year limitation period runs from the date the judgment of conviction "becomes final." The court's conclusion that petitioner's § 2255 motion was untimely, because it was filed more than one year after the court issued its mandate affirming petitioner's conviction – the last act on direct review – is wholly consistent with the ordinary and well-established rules regarding the finality and effectiveness of judgments. The finality of the judgment of the Court of Appeals was not dependent upon the expiration of the time for further review. Petitioner did nothing to suspend the finality of that judgment or to arrest the running of the statute of limitations. Therefore, under the principles set forth above, including the established law governing comparable motions under the former version of Federal Rule of Criminal Procedure 33 (as well as practice under the Speedy Trial Act), petitioner had one full year from the issuance of the mandate to bring a motion under § 2255.[16]

"*if an appeal or petition for certiorari is filed*, the action occasioning the retrial should not be considered final until the appeal or petition has been disposed of." *Id.* (emphasis added).

[16] Although the question is not presented here, there is authority upon which the Court could conclude that the statute of limitations would have been arrested if petitioner *actually had filed* a petition for certiorari. This Court and others often have determined that a time bar or statute of limitations may be arrested or tolled, even without explicit statutory authority, upon an actual filing for review of a judgment to which the statute of limitations is linked. *See* pp. 31-35, *supra*. *But see* pp. 22-27, *supra*. It

At bottom, the parties' position rests on the view that, without any further definition in the statute, the judgment of a court does not "become final" until the time expires for *review* of that judgment. Such a construction undermines the integrity of a judgment of a court. It is one thing to say that the actual filing of a petition for review operates to suspend the finality of a judgment and to arrest the running of a time bar or other statute of limitations tied to the existence of that judgment. Such rules of suspension promote efficiency and economy for all concerned. But finality has rarely been dependent on an action that *could* have been taken, but was not. Relying heavily on the "negative inference" presented by the omission of words in § 2255 that appear in § 2244, the court here properly held that petitioner's judgment of conviction had "become final," as provided by § 2255, when the Court of Appeals issued its mandate and the petitioner took no further action to arrest or suspend the finality of that judgment.

III. THE PARTIES' ARGUMENTS OF INCONGRUITY AND IMPRACTICALITY DO NOT UNDERMINE THE STATUTORY INTERPRETATION OF THE COURT OF APPEALS.

The parties make several policy arguments why this Court should ignore the stark differences between § 2255 and § 2244, interpret the provisions to mean exactly the same thing, and disregard settled rules regarding the finality of judgments. None of those reasons, however, withstands scrutiny.

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is noteworthy that the Courts of Appeals broadly have held that the one-year period in both § 2255 and § 2244 is a statute of limitations, subject to the doctrine of equitable tolling, rather than a jurisdictional requirement. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1004 & n.1 (6th Cir.) (collecting cases), *cert. denied*, 122 S. Ct. 649 (2001).

A. This Court's Definition Of "Final" For "Purposes Of Retroactivity Analysis" Is Atypical And Based On Considerations That Are Fundamentally Different From Those At Issue Here.

In a series of cases, this Court has held that "[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally decided." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *see also, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *Teague v. Lane*, 489 U.S. 288 (1989). The parties contend that this is the most logical meaning of the word "final" for purposes of the statute of limitations in § 2255 and that Congress must have intended this meaning.

At the outset, although this indisputably is a meaning of "final" that this Court has used in these cases, as noted above the Court elsewhere has described this definition of "final" as "unusual." *See* p. 29, *supra*; *Melkonyan*, 501 U.S. at 95. More fundamentally, however, it is clear that this definition of "final" for purposes of retroactivity analysis – which is not based on the language of any statute – is rooted in concerns fundamentally different from those that typically arise with regard to the determination of when a judgment "becomes final" for purposes of the commencement of a statute of limitations.

This Court's resolution of how to apply new constitutional rules has changed over time and has evoked strongly held views. *See, e.g., Griffith*, 479 U.S. at 320-22 (Court has "shifted course"); *id.* at 329-34 (White, J., dissenting); *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 209-18

(1990) (Stevens, J., dissenting); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102-10 (1993) (Scalia, J., concurring). In *Griffith*, the Court broadly established that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328. The Court drew the line where it did, however, because of "basic norms of constitutional adjudication." *Id.* at 322. Repeating the words of Justice Harlan, the *Griffith* Court explained that "[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring)) (internal quotation marks omitted).

The line of demarcation employed in *Griffith* was thus dictated by "the nature of judicial review," which "precludes us from '[simply] fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.* (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring)). The Court in *Griffith* also emphasized that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

Two years later, in *Teague*, the Court adopted and applied the same line of demarcation established in *Griffith* to cases arising on collateral review. Thus, *Teague* holds that "[u]nless they fall within an exception to the general rule, new

constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (plurality op.); *see also Caspari*, 510 U.S. at 389 ("The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a new rule announced after his conviction and sentence become final.").

The decision in *Teague* rests heavily on the inherent (and limited) function of habeas corpus: "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error. . . . Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague*, 489 U.S. at 308 (plurality op.) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality op.)) (internal quotation marks omitted); *see also Bousley v. United States*, 523 U.S. 614, 620 (1998) ("The *Teague* doctrine is founded on the notion that one of the principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. Consequently, unless a new rule of criminal procedure is of such a nature that without [it] the likelihood of an inaccurate conviction is seriously diminished, there is no reason to apply the rule retroactively on habeas review." (citations and internal quotation marks omitted)).

In sum, "for purposes of retroactivity analysis," *Caspari*, 510 U.S. at 390, the Court has drawn a sharp line between "direct" and "collateral" review, for reasons bound up with the very nature of constitutional adjudication and with the limited scope of the writ of habeas corpus. In large measure, these concepts, rather than any generalized notions of when a judgment of a court "becomes final," drove what the Court characterized as a "final" judgment for this limited purpose.

Thus, without more, it simply cannot be said that Congress must have intended the words "becomes final" in § 2255 to mean the *Griffith/Teague* formulation.

Moreover, Congress's formulation in § 2244 is analogous to the formulation in the *Griffith/Teague* line of cases, but the formulation in § 2255 markedly is *not*.[17] Thus, the very difference in language between § 2244 and § 2255 indicates that Congress did *not* intend to adopt the *Griffith/Teague* definition under § 2255. And, as explained below, there are valid reasons why Congress may have chosen to adopt the "unusual" *Griffith/Teague* concept of finality in § 2244, but not in § 2255.[18]

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[17] *Compare* 28 U.S.C. § 2244(d)(1)(A) (judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review") *with Griffith*, 479 U.S. at 321 n.6 ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). *But see* 28 U.S.C. § 2255 para. 6(1) ("becomes final").

[18] By the same token, it is no help to contend that this Court should "presume" that Congress "expected" § 2255 to be read in conformity with "this Court's precedents" – for which the parties selectively have chosen the *Griffith/Teague* line of cases. *See* Pet. Br. at 14-16; Gov't Br. at 17 (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)). Because the *Griffith/Teague* line provides only one of several definitions of "finality" that this Court has established, to "presume" that Congress intended to apply *this* formulation of "final" is simply to assume, without analysis, the answer to the very question in this case.

B. The Differences In Collateral Review Of State And Federal Convictions, And Indeed The *Griffith/Teague* Cases, Support The Different Meanings Of § 2255 And § 2244.

The government asserts that "[t]here is no plausible reason why Congress would have chosen a different definition of 'finality' to apply to federal prisoners under Section 2255 than to state prisoners under Section 2244." Gov't Br. at 29; *see also* Pet. Br. at 20-21. At the outset, it is not necessary for this Court to divine and find sufficient a reason for what Congress has done; the critical point is that the language of § 2255 is plainly and materially different from the language of § 2244, and – *particularly* given that difference – there is no reason to impose upon the language of § 2255 an *atypical* requirement that a judgment "becomes final" only upon the expiration of the time for review. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 717 (2002) ("It is . . . not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect."); *Mansell v. Mansell*, 490 U.S. 581, 594 (1989) ("we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute").

Nevertheless, there *are* reasons why Congress would treat claims under § 2255 and § 2254 (to which § 2244 relates) differently, a point made clear in part by the very cases on which the parties heavily rely. Although § 2255 and § 2254 both involve collateral review of criminal convictions and are certainly appropriately compared to each other, the nature of the two kinds of proceedings is still very different. Under § 2254, a state prisoner commences a civil action in federal court; a § 2255 motion is simply a further step in a federal prisoner's criminal case. *See, e.g., United States v. Frady*, 456

U.S. 152, 182 (1982) (Brennan, J., dissenting) (quoting S. Rep. No. 80-1526, at 2 (1948)). As a result, courts acting on § 2254 petitions can address only wrongful custody, but courts considering § 2255 motions can provide a broader range of relief, such as correcting sentences and granting new trials. *See* Rule 1 Governing Section 2255 Proceedings for the United States District Courts advisory committee's note. More importantly, federal habeas review of state convictions pursuant to § 2254 involves the *reconsideration* of federal claims that first must have been raised and fully exhausted in state court, *see* 28 U.S.C. § 2254(b)(1)(A), whereas a federal prisoner generally may only raise claims in a § 2255 motion that were *not* already considered on direct appeal, and must justify his failure to raise these claims earlier. *See generally Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part); *Kaufman v. United States*, 394 U.S. 217, 227 (1969). Given these differences, there is no reason why in establishing limitation periods Congress would have insisted on treating federal prisoners who do not seek discretionary review exactly the same way as state prisoners who fail to seek such review.

Moreover, the very concept of "finality" invoked by the parties as most applicable here, based on the decisions of this Court in *Griffith* and *Teague*, suggests why a different limitation period under § 2244 and § 2255 "makes perfectly good sense." *Beach*, 523 U.S. at 418. There is longstanding authority that a state prisoner may not seek a writ of habeas corpus from a federal court until the time has expired for the state prisoner to file a petition for certiorari on direct review.[19]

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[19] At one point, the "exhaustion" rule required a state prisoner to first *seek* review in this Court, typically by filing a petition for a writ of certiorari, so that this Court (rather than a lower federal court) might first review the state court judgment. *See Darr v. Buford*, 339 U.S. 200, 207 (1950).

This practice is consistent with the notions of federalism and comity at issue in *Teague*: in a case in which the state prisoner's conviction has not yet become "final" under *Griffith*, and this Court announces a new rule applicable to a claim exhausted on direct appeal, the practice encourages a state prisoner to file a petition for certiorari and allows this Court simply to "grant, vacate and remand" the case to the state court so that it can consider and apply the new rule in the first instance.[20] Because a state prisoner cannot or should not file a petition for habeas corpus under § 2254 until the time to file a

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Although this is no longer required, *see Fay v. Noia*, 372 U.S. 391, 435-38 (1963), federal courts still generally do require a state prisoner to wait until the time has expired for filing a petition for certiorari on direct review before litigating a petition for habeas corpus. *See, e.g., Raines v. New York*, 992 F. Supp. 160, 161 (N.D.N.Y. 1998); *King v. Cook*, 287 F. Supp. 269 (D. Miss. 1968); *United States ex rel. Stevens v. McCloskey*, 239 F. Supp. 419 (S.D.N.Y.), *aff'd*, 345 F.2d 305 (2d Cir. 1965), *rev'd on other grounds*, 383 U.S. 234 (1966).

[20] One of the core motivating considerations in *Griffith* was the Court's need to "resolve *all cases before us on direct review* in light of our best understanding of governing constitutional principles." *Griffith*, 479 U.S. at 323 (emphasis added) (internal quotation omitted). In *Griffith*, the Court emphasized that, "[a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* This Court's "GVR" practice "alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)); it is a "deferential approach to state courts when the intervening event consist[s] of one of our own decisions," *id.* at 180 (Scalia, J., dissenting); and it "avoid[s] the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below," *id.* at 181.

petition for certiorari expires, it makes sense that the time limitation in § 2244 begins to run only after that time expires.[21]

These same concerns are not implicated by motions under § 2255, and there does not appear to be an established comparable rule (or any reason for it). As explained above, most § 2255 claims have not been litigated on direct review. In many cases, the defendant may elect not to file a petition for certiorari with regard to the claims that were raised on direct appeal, and instead may wish to proceed directly to litigate *other* claims under § 2255 before the very same district court that originally entered judgment. Here, interests of federalism and comity do not provide a reason to require the defendant to wait to file the § 2255 claim until the time expires to file a petition for certiorari on direct review. The "inter-court" dynamics at issue with regard to collateral review under § 2255 simply are inherently different from the dynamics at issue with regard to habeas corpus review under § 2254.[22]

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[21] In most cases, of course, there will be no new intervening law before the time expires to file a petition for certiorari; the state prisoner need not and might choose not to file a petition for certiorari; and the prisoner then can bring his claim after the time to file a petition for certiorari expires (and the time bar in § 2244 begins to run).

[22] However, if the defendant *does* file a petition for certiorari, it may be appropriate to defer litigation of the § 2255 claim and to arrest the running of the statute of limitations until the petition is resolved. *See* pp. 31-35, *supra*. Courts generally have held that a motion under § 2255 will not be entertained while there is an appeal pending in the Court of Appeals or this Court. *See, e.g., Feldman v. Henman*, 815 F.2d 1318, 1320-21 (9th Cir. 1987) ("A district court should not entertain a habeas corpus petition while there is an appeal *pending* in [the Court of Appeals] or in the Supreme Court." (emphasis added)); *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir. 1998) ("It makes no sense to crank up a collateral attack while a *pending* appeal may afford the prisoner the relief he seeks." (emphasis added)); *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) ("absent extraordinary circumstances, the district court should not consider § 2255

In this regard, the interpretation of the Court of Appeals allows § 2255 to operate in a manner consistent with the ordinary operation of a statute of limitations. Fundamentally, statutes of limitations commence when a cause of action accrues and a claim may be brought. *See, e.g., Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff's business."). Here, the "injury" giving rise to a claim under § 2255 essentially is the (allegedly wrongful) action of the federal courts in entering and affirming a judgment of conviction. Once the Court of Appeals issued its mandate in this case, petitioner was free to return to the district court and commence the litigation of his § 2255 claims. Petitioner certainly was not *obligated* to file a petition for certiorari, and there are no reasons of comity or federalism to prohibit him from commencing litigation on his § 2255 claims once the mandate had issued. Indisputably, a principal purpose of the statute was to facilitate the prompt adjudication of such claims. *See supra* note 6; Gov't Br. at 25.

Yet, even though the judgment of the Court of Appeals was final upon the issuance of the mandate and petitioner was then free to bring his § 2255 claims, under the parties' interpretation the limitation period would not yet begin to run. This is inconsistent with the normal operation of a statute of limitations. The claim had "accrued"; it was known to petitioner; there was no obstacle to its submission. In these circumstances, the Court of Appeals properly determined that

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motions while a direct appeal is pending"); *United States v. Khoury*, 901 F.2d 975, 976 (11th Cir. 1990) (same). But, with respect to claims under § 2255, if the defendant chooses *not* to file a petition for certiorari on direct appeal, there is no reason to *require* the defendant to wait to bring the § 2255 claim until the time to file the petition for certiorari has expired.

the judgment had "become final" and the limitation period was triggered – even if that limitation period could have been arrested if petitioner actually had filed a petition for certiorari.

Ultimately, however, the critical point remains that the relevant language of § 2255 is materially different from the language of § 2244, and there is no reason to assume that Congress nevertheless meant exactly the same thing by it. Moreover, as shown below, there is nothing illogical, impractical or harmful in the consequences that follow from the interpretation of the Court of Appeals to suggest that it must be wrong.

C. The Remaining Arguments Of Impracticality Advanced By The Parties Also Do Not Favor A Different Result.

1. The parties also argue that the statute of limitations in § 2255 should not begin to run "until the law that will govern the defendant's entitlement to post-conviction relief is settled," and that this "occurs when the defendant's conviction becomes 'final' for *Teague* purposes, which . . . is when the time for seeking certiorari expires." *See* Gov't Br. at 24. As explained above, however, this is a more relevant concern with respect to petitions under § 2254 than motions under § 2255. Moreover, defendants have *one year* in which to file a § 2255 motion, which is long after any changes in the law may have occurred during the time that the defendant could have filed a petition for certiorari on direct review. In the unlikely event that the defendant filed his § 2255 motion in the brief window between the time that the Court of Appeals issued its mandate and the time expired to file a petition for certiorari, and the applicable law then changed during the remainder of that period, the defendant still would have ten months before the statute of limitations expired to amend or supplement his motion. *See, e.g., United States v. Barrett*, 178 F.3d 34, 45 (1st Cir. 1999).

2. In addition, the parties argue that the interpretation of the Court of Appeals will encourage the filing of additional and unnecessary petitions for certiorari. *See* Gov't Br. at 25 (stating that "the interpretation that treats a conviction as final when the court of appeals issues its mandate 'create[s] a strong incentive for prisoners to file plainly frivolous petitions for certiorari for the sole purpose of extending their time for habeas review'" (quoting *Kaufmann v. United States*, 282 F.3d 1336, 1338 (11th Cir. 2002))). But this concern surely is unfounded. If the defendant's purpose is simply to extend the proceedings, he will file a petition for certiorari in any event, because the actual filing will garner not only the additional sixty-nine days between the issuance of the mandate and the time in which a petition for certiorari must be filed, but also the time during which this Court considers the petition. The rule that encourages additional petitions for certiorari is the rule – which never has been considered by the Court, and is not at issue here – that the filing of a petition for certiorari *automatically* arrests the statute of limitations until the petition is *resolved*. *See id.* at 14 n.3.

3. Nor is there any reason to believe that the decision of the Court of Appeals will "lead at least some defendants to prepare their Section 2255 motions and petitions for certiorari simultaneously." *Id.* at 23. Presumably, if a defendant is *preparing* a petition for certiorari, he most likely will file it, which will extend the time for filing the § 2255 motion. Further, even if the defendant ultimately were to decide *not* to file the petition, he would still have almost ten months to prepare his § 2255 motion. Litigants face these choices all the time – in deciding, for example, whether to pursue a petition for rehearing or an appeal.

In sum, none of the arguments of impracticality advanced by the parties suggests that Congress acted illogically in enacting the two different limitation provisions that appear in

§ 2255 and § 2244. As a result, there simply is no reason to conclude that the very different words chosen by Congress should be interpreted to have the same meaning. As the parties have admitted, the most important thing is simply to have an established and uniform rule for motions filed under § 2255; the issue obviously is not whether one mechanism is better than the other. If, despite the difference in words used, Congress wishes § 2255 to have the same meaning as § 2244, Congress of course is free to change the statute.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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